IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CMPMO No. 241 of 2006.

Date of Decision:1st September, 2006.

Promila Bakshi and others. …. Petitioners.

Versus

Ashok Bhatia and others. Respondents.

Coram

The Hon'ble Mr. Justice V.K. Gupta, C.J.

Whether approved for reporting[1]?

For the Petitioner: **Mr. Kuldip Singh, Senior Advocate, with Mr. Bimal Gupta and Mr. Karan Singh Kanwar, Advocates.**

For the respondent: **Mr. K.D. Sood, Advocate, for respondents No.1 and 49.**

Mr. Tara Singh Chauhan, Advocate, vice Mr. Suneet Goel, Advocate, for respondent No.12.

V.K. Gupta, C.J. (Oral).

Vide the impugned order dated 19th July, 2006, the learned Civil Judge (Junior Division) Court No.2, Kasauli, District Solan has rejected the Application of the petitioners filed under Order 23 Rule 1(3) of the Code of Civil Procedure for permission to withdraw the pending suit with liberty to file a fresh suit on the same cause of

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[1] Whether reporters of the Local Papers are allowed to see the Judgment?

action. Sub Rule (3) of Rule 1 of Order 23 of the Code of Civil Procedure reads thus:-

> **"(3) Where the Court is satisfied,-**
>
> **(a) that a suit must fail by reason of some formal defect, or**
>
> **(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."**

By now it is a settled proposition of law that permission to withdraw the suit with liberty to file a fresh suit can be granted to a plaintiff only if one of the two situations or contingencies exist, or are made out, viz. that the suit may not fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit on the same cause of action. The existence of both these grounds or even one of them, of course

is subject to the satisfaction of the trial Court.

I have carefully gone through the impugned order as well as the contents of the Application filed by the petitioners for permission to withdraw the suit and find that in so far as the first ground is concerned surely it cannot be said that the suit as instituted suffered from any formal defect. On the own showing of the petitioners the suit as instituted suffered from vital and grave defects of substance, actually very, very vital defects of substance and by no stretch of imagination could any of these be called as "formal defects". The learned trial Court has correctly held and with elaborate reference to the contents of the Application and the material on record that the Application filed for granting permission to withdraw the suit was also very vague. I have myself gone through the copy of the Application and fully agree with this opinion of the learned trial Court.

The petitioners filed the suit originally in the year 1986 and in the year 1997 for the first time obtained permission from the Court under Order 23 Rule 1(3) of the Code of Civil Procedure for filing a fresh suit on the same cause of action which actually was filed afresh in the year 2000. The main ground for filing the latest

Application for permission to withdraw the suit was that some Urdu language record had been traced and that the perusal of this record revealed, inter alia that certain persons whose names had been mentioned in the suit and whose parentage was not known are parties and that these persons are no longer alive. The Application further states that certain "transfers" have taken place during the pendency of the present suit and the said "sales" are also to be challenged by the petitioners. It also avers that some new "facets" have emerged which are required to be incorporated etc. etc. The petitioners in the Application did not at all state any material fact or any material particular as to who were the persons who had died or which were the "transfers" which had taken place during the pendency of the suit and as to what are the "facets" which have now emerged which are required to be incorporated in the new suit proposed to be filed.

It may also be worthwhile to take note of the fact that in the same suit, an Application for amendment of the plaint was filed by the petitioners in the trial Court which was rejected by the learned trial Court. The rejection order was challenged in this Court by filing CMPMO

No.211 of 2005. On 5th October, 2005 in the said petition, this Court passed the following order:-

> "Mr. Kaushal submits that in the cause title of the petition, as far as the particulars of the respondents are concerned, there are some defects. Rather than applying for amendment, the petitioners would like to cure these defects by filing a fresh petition by seeking leave of this Court to withdraw the petition.
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> The petition is dismissed as withdrawn. Liberty to file fresh petition on the aforesaid ground and with the aforesaid limited extent is allowed."

Even though this Court had given liberty to the petitioners as far back as on 5th October, 2005, no fresh petition was filed by the petitioners which clearly indicates that the petitioners had accepted the order rejecting the amendment Application.

I am convinced that the suit neither suffered from any formal defect nor was any fresh ground made out for allowing the petitioners to withdraw the suit with permission to file a fresh suit. Apparently, when the petitioners realized at the fag end of the suit, when the entire evidence in the case was over and the suit is now fully ripe for final arguments, that perhaps there are no chances of success in the suit, they

used this ploy of seeking permission to withdraw the suit with liberty to file a fresh suit.

The learned trial Court has very correctly appreciated the fact that the litigation between the parties in the Court of the first instance itself has been going on for almost 20 years. The petitioners had been once permitted to withdraw the suit and despite that permission the new suit as was thus filed in the year 2000, as reframed by the petitioners themselves, on their own showing, also suffered from certain defects. Surely the respondents cannot be made to suffer the agony of protracted litigation merely because the petitioners think that they have no chance of success in the suit as has presently been framed.

There is no merit in this petition. The petition is dismissed.

Caveat Petitions No.434 & 441 of 2006.

Allowed and disposed of.

CMPs No.486 & 487 of 2006.

In view of the dismissal of the main petition, both the Applications shall stand dismissed.

1st September, 2006. (V.K. Gupta), C.J.
(tr)